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Supreme Court of the United States

October Term, 1937—No. 435.

NEW YORK RAPID TRANSIT CORPORATION,
Plaintiff-Appellant,

against

THE CITY OF NEW YORK,
Defendant-Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW YORK.

APPELLEE'S BRIEF.

February 2, 1938.

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Opinions Below.

The opinion of the Special Term of the Supreme Court of New York (R. 53-57) is unofficially reported in 97 N. Y. L. J. 241. The memorandum of the Appellate Division of the Supreme Court of New York, First Department (R. 59-60) is reported in 251 App. Div. (N. Y.) 710. The opinion of the Court of Appeals of New York (R. 62-68) is reported in 275 N. Y. 258, 9 N. E. (2d) 858.

Jurisdiction.

An order allowing appeal (R. 94) was signed by the Chief Judge of the State on August 24, 1937. On October 25, 1937, this Court noted probable jurisdiction.

Question Presented.

Are New York City Local Laws Nos. 2 and 30 of 1935, adopted pursuant to authority conferred by the Legislature of the State to enable the appellee to raise funds to be earmarked for unemployment relief, and imposing a tax equal to 3% of gross receipts upon the exercise of franchises by a class of public utilities which includes the appellant, *constitutional*, or do they violate (1) the due process clause of the Fourteenth Amendment, or (2) the equal protection clause of the Fourteenth Amendment, or (3) the obligation of contracts clause of the U. S. Constitution?

The State Court of last resort upheld the statutes against all three challenges. 275 N. Y. 258; R. 62-68.

Statutes Involved.

The statutes involved are set forth in the record as follows:

N. Y. Laws 1934, ch. 873, R. 28;
N. Y. Laws 1935, ch. 601, R. 30;
N. Y. C. Local Law No. 2 of 1935, R. 33;
N. Y. C. Local Law No. 30 of 1935, R. 42.

Statement.

The case is here upon appeal from a judgment of the Supreme Court, New York County, entered upon a remittitur from the Court of Appeals, State of New York, in an action for money had and received to recover taxes paid under protest on the ground that the taxing statutes are unconstitutional. To the Court of Appeals was certified (Civil Practice Act, § 588 [4]) this question (R. 59): "Does the [amended] complaint herein state facts sufficient to

constitute a cause of action?" And the question was answered in the negative, in an opinion *per* FINCH, J., concurred in unanimously. Both lower courts were reversed, interlocutory orders denying motions to dismiss the complaint were vacated, and a final order and judgment entered dismissing the complaint with costs in all courts (R. 70).

1. The amended complaint.

The amended complaint alleges that the plaintiff is a domestic corporation engaged in the operation of certain rapid transit railroads in the City of New York. Under a contract, known as "Contract No. 4," dated March 19, 1913, the City and the New York Municipal Railway Corporation agreed to build certain rapid transit railroad lines, the latter corporation becoming the operating lessee. Eventually, it went into receivership and all its assets including the lease were acquired by the plaintiff on June 14, 1923 (R. 6).

Among the obligations in the lease thus assumed by the plaintiff was the obligation to pay the City of New York 50% of the gross receipts, after deducting rentals to other railroad companies, taxes and assessments, operating expenses, and certain other fixed charges and expenses enumerated (R. 4-5).*

It is alleged in the eighth paragraph of the amended complaint that the plaintiff (R. 6-7)

> "is under the supervision of the Transit Commission, which is the Metropolitan Division of the Department

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* The appellant has never paid the City any interest on its investment in the railroad, or any part of its gross receipts. The City's cumulative deficit resulting from the interest and amortization payments due it by reason of its investment in the railroad under Contract No. 4 was in excess of $140,000,000 on June 30, 1936. *16th Annual Report*, 1936, Transit Commission of New York, page 85. This report is one of the same series which appellant deems itself at liberty to cite (brief, p. 37), notwithstanding its non-inclusion in the record.

of Public Service, although said Transit Commission has no power to authorize any increase in the rate of fare which the plaintiff may charge its passengers."

Reference is then made (R. 8) to the Enabling Acts and the Local Laws of the City of New York passed thereunder, and it is alleged that Local Law No. 2 of 1935 imposes upon the class to which the plaintiff belongs * an excise tax equal to 3% of its gross income for the year 1935. By the same local law, utilities not subject to the Transit Commission or Public Service Commission are subjected to a tax of 3% of their gross operating income.

Local Law No. 2 of 1935 was reenacted to cover an additional period of time (without changes of substance) by Local Law No. 30 of 1935. Its application to the plaintiff is set forth at Record 8-10.

The provisions for the earmarking of the proceeds of the tax for unemployment relief are referred to at Record 10.

The plaintiff goes on to allege that it has paid to the City, under protest, the sum of $1,408,697 pursuant to the local laws in question (R. 12).

Various other statutes and the taxes the plaintiff has to pay to the State and the City in order to operate under its franchises are detailed in Paragraphs 25-29 of the amended complaint (R. 13-15).

The limitation of the plaintiff to a five-cent fare is set forth at Record 15-16.

The operation of certain new municipal subway lines directly by the defendant in competition with the plaintiff is alleged at Record 16.

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* That is, utilities subject to the jurisdiction of the Transit Commission or the Public Service Commission of the State.

The failure to tax taxicabs though they compete with the plaintiff is alleged at Record 17.

The fact that these taxes, though imposed for State purposes, are confined to utilities operating within the territorial limits of New York City, is alleged at Record 17-18.

As a further grievance, it is alleged (R. 18-19) that the tax operates with peculiar severity on the plaintiff because the operating and maintenance expenses of rapid transit railroads "are far higher in proportion to gross receipts than the operating and maintenance expenses of corporations engaged in other types of business but included in the same class" subjected to taxation by the local laws in question.

Inequality is pleaded in Paragraph 41 in these terms (R. 19):

> "The imposition of the tax is a plainly arbitrary method of collecting money for unemployment relief purposes in the easiest way without any thought of or attempt at equal distribution of the tax burden in proportion to benefits or to capacity to pay on the part of the respective persons and corporations taxed, or to the value of the privilege taxed."

A violation of the obligation of contracts clause of the Federal Constitution is alleged at R. 20-21.

A summary of grievances is found in Paragraph 47, where it is alleged that the local laws, as well as the Enabling Acts, (1) impair the obligation of plaintiff's contract in calling for payments by the lessee not contemplated when the contract was entered into; (2) violate the due process clause in making a fair return on plaintiff's invested capital impossible, in exacting money from one group for the benefit of another group (the unemployed), in measuring the tax by gross rather than by net income, and in

taxing the plaintiff without regard to benefits received from the project the tax is aimed to support; and (3) violate the equal protection clause in that they single out one group for an especially heavy tax, they do not tax equally persons engaged in transporting passengers for hire, they do not operate throughout the State though the taxes imposed are for State purposes, they make a discrimination based on subjection *vel non* of the taxpayer to the supervision of the Transit Commission or Public Service Commission, they operate with especial burdensomeness on transportation companies because of the severity of the competition they are subjected to and because of their inability to charge more than a five-cent fare, and they tax at the same rate the gross income of different types of corporations "which are so essentially different in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another, * * *" (R. 25).

2. The defendant's motion to dismiss the complaint.

The defendant, upon due notice, moved in the court of first instance (R. 3)

> "for an order dismissing the complaint herein and directing judgment for the defendant, on the grounds that the complaint does not set forth facts sufficient to state a cause of action and that the Court has no jurisdiction of this action, and for such other and further relief as to this Court may seem just and proper."

The jurisdictional question raised by the motion is, of course, no longer in the case. The Court of Appeals held (R. 63) that the Court did have jurisdiction of an action at law in the premises and that the administrative remedy of an order of certiorari to review the Comptroller's determination was not exclusive. The Court accordingly examined the amended complaint upon the merits.

3. The opinion of the Court of Appeals.

The major question was stated to be whether it was constitutional to impose a tax at the same rate upon the gross incomes of different types of corporations "which are so essentially different in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another" (Amended complaint, R. 18; Opinion, R. 64). In upholding the tax against this attack, the Court referred to the taxes which this Court had upheld in *Alaska Fish Co.* v. *Smith*, 255 U. S. 44 (1921), *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114 (1910), and *Tax Commissioners* v. *Jackson*, 283 U. S. 527 (1931), and said that they, and many like taxes (R. 65),

> "have been upheld although it is evident that the burden of the tax falls more heavily on some in the classification than on others, whether by reason of low margin of profit, contractual obligations, competition, or other circumstances. The remedy if needed lies not with the judiciary but with the Legislature. (*McCray* v. *United States*, 195 U. S. 27, 56 *et seq.*)"

Rejecting the contention that the tax was bad because it grouped transit companies having a small margin of profit and a five-cent-fare clause in their franchises with other companies not so handicapped, the Court pointed out that the local legislature might have made separate categories of each and then taxed both categories at 3%, so that the distinction sought to be made had no substance. The Court then said (R. 65-66):

> "Concerned as we are primarily with substance rather than form, we see no reason for holding a tax on a certain type of utility invalid because it is imposed as part of a general tax on all utilities, when the same result could have been achieved by taxing various types of utilities under separate classifications."

The argument as to the violation of the obligation of contracts clause was rejected on the authority of *Puget Sound Power & Light Co.* v. *Seattle,* 291 U. S. 619 (1934). And as to the related point that its franchise protected plaintiff from the imposition of taxes under laws not envisaged at the date of the franchise, the Court said (R. 67):

> "There is thus no basis whatever for reading into the above contract any express or implied obligation on the part of the city to surrender its power to tax the privilege granted to the plaintiff under laws either in existence at the time of the contract or thereafter enacted. Nor can any merit be found in the argument that the enabling acts, although general in language, must be construed as not intended to apply to transit companies because of their pre-existing contracts with the city."

The earmarking of this particular tax for unemployment relief was held no reason for invalidating it, a conclusion for which the Court found (R. 67-68) ready and ample support in *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 313 (1937).

Other less serious challenges to the statute were disposed of in short order by the Court (R. 68), and need not detain us.

Summary of Argument.

Upon the record as outlined above, we propose to argue as follows:

1. The separate classification of utilities was not a denial of equal protection. Although the proceeds of the tax were earmarked for unemployment relief, the classification was not required to be based on considerations other than those sufficient to support a

general revenue tax since (1) the burdens of the tax need not be apportioned to the benefits derived; and (2) the alleged defect could be removed by separation of tax and appropriation. And in any event the possible legislative considerations amply justify the classification.

2. Uniform treatment of rapid transit companies and other utilities is not a denial of equal protection since the Fourteenth Amendment does not forbid incidental inequalities arising from uniform treatment and since the legislature would have been justified in classifying rapid transit companies separately from other utilities. (Under this same point we shall deal briefly with appellant's claim of hostile discrimination in violation of the due process clause.)

3. The imposition of the tax in question does not impair the obligation of appellant's contract with the City, since the contract contained no express or implied surrender of the power to tax.

POINT I.

The imposition of a tax at different rates upon utilities and other businesses does not violate the equal protection clause of the Fourteenth Amendment.

Appellant in its amended complaint (Paragraphs 28, 47; R. 13-14, 23) complains of the classification made by the local laws in that utilities, including appellant, are taxed at a rate equal to 3% of gross income while financial businesses pay only 1/5 of 1% and other businesses 1/10 of 1%. This attack on the local laws was held to be without substance by the State Court in this case (R. 67) and in two earlier

cases (*New York Steam Corp.* v. *City of New York*, 268 N. Y. 137, 147 [1935]; *Garfield* v. *New York Telephone Co.*, 268 N. Y. 549 [1935]), and by the Circuit Court of Appeals for the Second Circuit in *Southern Boulevard R. Co.* v. *City of New York*, 86 F. (2d) 633, 636 (C. C. A. 2d, 1936), certiorari denied 301 U. S. 703 (1937).

On this appeal appellant has narrowed the scope of its attack on the local laws. It concedes (Brief, pp. 26-27) that the separate classification of utilities would be valid if made for the purpose of an ordinary excise tax. It admits (Brief, p. 27) that such a classification is made in the regular tax program of the State. Appellant does not contend that the earmarking of the proceeds of the tax is in itself a defect, recognizing (Brief, p. 32) that this Court in *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308 (1937), decided that the earmarking of the proceeds of a tax for a proper purpose does not prevent its being a true tax or make it an invalid expropriation of money from one class for the benefit of another. Finally, appellant nowhere disagrees with the finding below (R. 68) that relief of unemployment is a legitimate public purpose (see *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 515-518 [1937]; *New York Steam Corp.* v. *City of New York*, *supra*, 268 N. Y. 137, 143 [1935]).

As narrowed by appellant's concessions, well-justified by authority, the claim is that a classification valid for an ordinary tax becomes invalid when made by a statute imposing an emergency excise tax the proceeds of which are to be devoted to a specific and proper public purpose, unless a relationship can be traced between the persons included in the classification and the object to which the proceeds are to be devoted. Such a relationship, appellant contends, is lacking here. We believe that this claim is without merit.

We need not argue, as appellant (Brief, p. 33) prophesies we shall, that the decision in *Carmichael v. Southern Coal & Coke Co.*, *supra*, p. 10, 301 U. S. 495 (1937), has put an end to all requirements that classification must rest upon some real ground of difference bearing a substantial relation to the object of the legislation. We think that the requirement so expressed is, in view of appellant's concessions, not pertinent to the present consideration and is, without regard to such concessions, satisfied by the circumstances here presented.

We do not, of course, deny the doctrine that the means adopted by a legislature must have a reasonable relation to the object sought to be accomplished. Nor do we question its usual application to tax statutes that have objects other than raising revenue. (See *e. g.*, *Alaska Fish Co. v. Smith*, 255 U. S. 44 [1921], where the object was conservation of natural resources). Where justification of a classification is attempted on the ground that the statute has a purpose other than revenue, the classification may be required to be based on considerations other than those which would support a tax for revenue only. For instance, if the sole basis for the classification is the purpose of conservation, the persons to be taxed must be chosen with that end in view.

Here the statute has no such collateral object. The purpose is to raise money. The classification, therefore, need not be based on considerations beyond those which would justify a classification made by an ordinary revenue tax.

Nevertheless appellant says that the purpose here is not simply to raise money, but to raise money to meet a particular expenditure; and the classification fails, it argues, because no relationship can be traced between the taxpayers and the expenditure in question. The classification being

otherwise concededly valid and the object of the expenditure being recognizedly legitimate,* appellant's argument can be seen in its true light; it is merely that there is no sufficient relation between the taxpayer and the benefits to the public from expending the sums raised by the tax.

In spite of appellant's assertion (Brief, p. 25) that this Court has never had the opportunity to pass on the point now involved, we submit that the point is in reality one that has been frequently urged and universally rejected, for this Court has consistently refused to hold that the burdens of the taxpayer must be apportioned to the benefits derived from public expenditure. The same contention sometimes appears in another form in the suggestion that a taxpayer may resist a tax because he is not responsible for the condition to be remedied. However expressed, it has received no approval. Only recently this Court said, in *Carmichael* v. *Southern Coal & Coke Co., supra*, p. 10 (301 U. S. at p. 521):

> "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied."

And again at page 523:

> "This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits

* Appellant in citing (Brief, p. 23) *Lowry* v. *City of Clarksdale*, 154 Miss. 155, 122 So. 195 and similar cases (Brief, p. 25) fails to distinguish between public as against private expenditures of tax proceeds. Unlike such a group as firemen, defined by ties of occupation, origin, etc., the needy unemployed are not a definite class. They are related to each other only by a common and perhaps temporary disability which is a matter of grave public concern, and the State has historically been subjected to the duty of taking care of the needy. *New York Steam Corp.* v. *City of New York, supra*, p. 10, 268 N. Y. at p. 143; *Matter of Atlas Television Co. Inc.*, 273 N. Y. 51 (1936).

derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him. *Cincinnati Soap Co.* v. *United States, supra; Carley & Hamilton* v. *Snook, supra,* 72; *Nashville C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 268; see *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 203."

In a footnote to that decision (p. 522), reference is made to numerous State statutes imposing taxes for specific public purposes upon classes of taxpayers who enjoy no direct benefit from the expenditure of the funds raised and who are not responsible for the condition to be remedied.

In *Magnano Co.* v. *Hamilton,* 292 U. S. 40 (1934), this Court in considering a tax on oleomargarine products said (p. 43):

"* * * a tax designed to be expended for a public purpose does not cease to be one levied for that purpose because it has the effect of imposing a burden upon one class of business enterprises in such a way as to benefit another class."

Pertinent also in this connection is the language of this Court in *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 203 (1905):

"But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal prop-

erty to be guarded; or of a road tax, though he never use the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot."

On a different ground we think appellant's claim is unjustifiable. By insisting (*e. g.*, Brief, p. 25) that a different standard of classification is required for the present tax to raise money for a specified purpose than for a general revenue statute, appellant disregards substance and exalts form. For as appellant realizes (Brief, pp. 30-31) the tax here in question could be cured of the alleged vice by a formal separation of tax and appropriation. Appellant's attempted answer that under the Enabling Acts the City had no authority to make this separation is insufficient, for we are concerned here ultimately with the power of the State, which the City exercises as its agent under proper delegation. That the State could make the formal correction and remove the claimed defect is, we think, implicit in the decision in *Cincinnati Soap Co.* v. *United States, supra*, p. 10, 301 U. S., at p. 323. Any disparity between the City's power in the premises, and the State's, is a question of State law not open on this appeal.

But even viewing the exaction at bar as one linked to the specific purpose of unemployment relief, the State Court * and the Circuit Court of Appeals † were thoroughly justified in finding that the classification was appropriate for the purpose in question. Utilities have historically been

* *New York Steam Corp.* v. *City of New York, supra*, p. 10.
† *Southern Boulevard R. Co.* v. *City of New York, supra*, p. 10.

subjected to special legislative treatment. They have received advantages over other businesses. They are afforded a degree of protection against competition which, if not absolute in some cases, constitutes at least an immense advantage over the position of other businesses, ever exposed to unlimited private competition. Some, including appellant here, have been assisted by municipal investment of enormous sums in their enterprises * or by grants of rights of way and other privileges. Convenience of administration, due to the supervision of the Department of Public Service, although perhaps not sufficient in itself to justify gross inequality (see *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 560 [1935]), is an added factor which may be given some weight. *Carmichael* v. *Southern Coal & Coke Co.*, *supra*, p. 10, 301 U. S. at p. 520.

And there are other differences, more intimately related to the evil sought to be cured by the local laws. Utilities by franchise or otherwise are given the right, usually exclusive to some extent, to cater to the most vital needs of the community. They are allowed to furnish for profit services which everyone must buy, particularly in a social organism as extensive and complex as the City of New York. We may take it as established, therefore, that utilities, by reason of the urgency and indispensability of the services they are engaged in furnishing, exhibit, in times of depression, comparatively great stability and comparatively slow response to the general evils of unemployment. This being so, the Legislature made a rational, and hence constitutional,

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* See Contract No. 4, pp. 20-27 (printing dispensed with by order [R. 82]). The Railroad was to be constructed by the City (Art. IX-X, p. 20) at its own cost less a contribution of $13,500,000 by the Lessee (Art. XI, p. 21). The City was also to acquire necessary real estate (Art. XIV, p. 26). The Lessee was to reconstruct existing lines (Art. XIII, p. 24) and to pay the cost of the Canal Street connection (Art. XI, p. 24).

classification for tax purposes when they imposed upon utilities what may in practice work out to be a comparatively heavy tax burden.

The above considerations supply ample justification for the statement in the *Southern Boulevard* case, *supra*, p. 10, 86 F. [2d], at p. 636, that,

> "The character of the utility business contains elements of difference which the Legislature is not bound to ignore and which it can use as a basis for reasonable discrimination. See *Atlantic Coast Line R. Co.* v. *Daughton*, 262 U. S. 413, 43 S. Ct. 620, 67 L. Ed. 1051; *Honolulu R. T. Co.* v. *Wilder*, 36 F. (2d) 159 (C. C. A. 9)."

We may refer also to the statement of the rule given in *Metropolitan Casualty Co.* v. *Brownell*, 294 U. S. 580 (1935) at page 584:

> "It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. *Rast* v. *VanDeman & Lewis Co.*, 240 U. S. 342, 357; *Tax Commissioners* v. *Jackson*, 283 U. S. 527, 537."

Finally, the argument that the tax upon the class to which the plaintiff belongs is 3000% higher than the tax imposed on persons or corporations engaged in purely mer-

cantile pursuits (3% as compared with 1/10 of 1%), does not make out a case of unfair discrimination, for the legislature is not compelled to tax every business as a condition of asserting the right to tax any. And when a group (*e. g.*, lawyers and doctors) is left untaxed, the tax on utilities is as to that group higher by infinity percent. The argument thus fails to stand up under scrutiny, and it was made and rejected in the *Southern Boulevard* case, *supra*, p. 10.

POINT II.

The imposition of a tax equal to 3% of gross income upon a class embracing both rapid transit companies and other utilities—groups which may exhibit different ratios of gross to net income—does not violate the Fourteenth Amendment of the Federal Constitution.

Appellant further complains that by classifying, under a fixed-rate tax measured by gross income, corporations having relatively small margins of profit with those having relatively large margins of profit, an unconstitutional inequality has been achieved. In this connection, appellant refers in its amended complaint (Paragraph 47, subd. 3 [e]; R. 25) to its inability to charge more than a five-cent fare, but lays greater stress (Paragraphs 40-41, 47, subd. 3 [b]; R. 18-19, 25) on what it alleges to be a business difference between transit corporations on the one hand and power, heat and light corporations on the other hand, namely, higher operating expenses and lower margins of profit. Because of these distinguishing factors, it is contended, the burden of the tax is unequally distributed and appellant is denied the equal protection of the law.

It will be seen that this argument is a distortion of the usual claim under the equal protection clause. Generally, attack is made upon an unequal legislative treatment of persons similarly situated. Here, the alleged defect is the equal treatment of diverse types of business. Equality of treatment is said to deny equal protection, uniformity to be discrimination.

(1)

It may be answered, first, that appellant mistakes the scope of the equal protection clause. We submit that, given an enactment which may reasonably be called a tax, uniformly applied by the Legislature at a fixed rate to all persons within a properly chosen class, there is no constitutional prohibition of incidental inequalities of burden.

To some extent, at least, any tax measured by gross income must necessarily impose burdens which vary with the nature of the taxpayer's business. High margins of profit will mean that the burden of the tax is light. A good business will find it easier to pay the tax than a poor business. Yet gross income taxes have been sustained by this Court. *Puget Sound Power & Light Co.* v. *Seattle*, 291 U. S. 619 (1934); *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114 (1910). Moreover, this Court has on several occasions refused to approve a contention that incidental inequalities arising from uniform treatment are a denial of equal protection. *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 163 (1930); *Exchange Drug Co.* v. *Long*, 281 U. S. 693 (1930); and see *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61 (1913). Poll taxes and retail sales taxes which must be passed on to the consumer are examples of familiar exactions the incidence of which varies with the circumstances of the taxpayer.

The tax in the present case is exacted from appellant for the privilege of exercising its franchise, holding property and doing business in the City of New York (R. 33, 44). The amount of gross income has an obvious relation to this subject, being a means of expressing the amount of business done and of measuring the extent of the exercise of the franchise. In choosing the measure of this tax the local legislature has reasonably selected an index, namely, "volume", recognized as significant by business men and frequently referred to in the commercial world in forming judgments upon business enterprises.

We have here, then, a tax upon a proper subject and with a reasonable measure, applied at a uniform rate to all within a class which may concededly receive separate treatment for the purposes of general taxation. In asserting that because of the peculiarities of its business the uniform rate imposed on it and other utilities is discriminatory, appellant in effect insists that the Municipal Assembly was constitutionally required to relieve it from the burdens (if such they have turned out to be) of its own contract and from a disability, namely, the need of relatively large working capital, inherent in the nature of its business. We believe this claim to be without merit.

The contention that this tax is discriminatory as applied to a corporation limited to a five-cent fare was expressly rejected in *Southern Boulevard R. Co.* v. *City of New York, supra,* p. 10, 86 F. (2d) 633 (C. C. A. 2d, 1936). The Court there said (at p. 637):

> "The inability of the appellant to shift the tax to the public because of the 5-cent fare, compelled by its franchise, does not render the tax unconstitutional. That is a hardship caused by its contract which, as we have said, did not curtail the taxing power."

We may add that so much of appellant's argument as is based upon differences in margins of profit was also made, in substance if not in form, in the *Southern Boulevard* case. After the opinion of the Special Term of the Supreme Court in the case at bar had been published (97 New York Law Journal 241), the attorney for the Southern Boulevard Railroad Company asked the Circuit Court of Appeals for leave to amend its complaint by adding a paragraph comparable to paragraph "40" of the complaint at bar. The Corporation Counsel pointed out that the Southern Boulevard Railroad Company's complaint already contained the substance of such a paragraph (see fols. 57-58 of the *Southern Boulevard* record); and the motion was denied (97 New York Law Journal 1379).

The point was again featured in the *Southern Boulevard* petition for certiorari, 301 U. S. 703 (1937).

We submit that the Municipal Assembly, in taxing all within the class at a uniform rate, has fulfilled the constitutional requirement of equal protection. As a legislature, the Municipal Assembly might properly have considered the extent to which individual taxpayers might be differently affected due to characteristic peculiarities of their businesses or to the effects of their own contracts; but the Constitution does not demand such consideration. It is inequality of treatment, not incidental inequality of burden, that is condemned by the Fourteenth Amendment. The legislative duty with respect to equality, as stated by this Court in *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337 (1885), "* * * only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances." The significance of the words "upon all persons in similar circumstances" is illustrated in the recent case of *Fox* v. *Standard*

Oil Co. of N. J., 294 U. S. 87 (1935), where a chain store tax graduated in rate according to the number of retail outlets was held constitutional as applied to a chain of gasoline filling stations. The Court rejected the argument that the business difference between gasoline chains and other chains needing fewer outlets resulted in a discrimination. The Court said in this connection (p. 102):

> "We have never yet held that government in levying a graduated tax upon all the members of a class must satisfy itself by inquiry that every group within the class will be able to pay the tax without the sacrifice of profits. The operation of a general rule will seldom be the same for every one. If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict."

And more recently, in upholding the Louisiana chain store tax, this Court said in *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412 (1937), at page 424:

> "We cannot say that classification of chains according to the number of units must be condemned because another method more nicely adjusted to represent the differences in earning power of the individual stores might have been chosen, for the legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships. * * * The statute bears equally upon all who fall into the same class, and this satisfies the guaranty of equal protection."

It would indeed be setting up an impossible standard if the Legislature, laboring under pressure to meet an emergency, were required to give heed and effect to the adventitious circumstance that operating and maintenance expenses of rapid transit railroads are higher in proportion to gross

receipts than those of other utilities falling under the local law in question.

Appellant has placed reliance on the case of *Stewart Dry Goods Co.* v. *Lewis, supra,* p. 15, 294 U. S. 550 (1935), in which a gross receipts tax with rates graduated with respect to volume of sales (as contrasted with the fixed-rate tax at bar) was invalidated. The opinions make it evident that the vice of the statute was the sliding scale of rates. What was there condemned was the unjustified inequality of legislative treatment, not an incidental inequality of burden resulting from uniform treatment. That the Court was not condemning a fixed-rate tax is apparent from the following language used at page 563:

> "The record fails to show that an income tax or a flat tax on sales would not accomplish the desired end. The adoption of laws of the latter description by many of the states is a practical confirmation of the view that they are effective measures."

Appellant's arguments (Brief, p. 47) based on different ratios of gross to net income are in substance a condemnation of all gross receipts taxes. The underlying assumption made by appellant is that these different ratios are not mere accidents of trade, but are the results of essential differences in character between street railroad companies and other utilities. But, on appellant's own statement, this basic assumption is subject to so many qualifications that it loses all value. Appellant's ratio of net to gross income is said to be 19%, that of Brooklyn and Queens Transit Corporation (the appellant in case No. 436) 14½%, while other street railroad corporations for the same period had no net income and suffered a net loss (Brief, p. 47). Thus it appears clear that, to a very large extent at least, differing margins of profit *are* due to "accidents of trade" such

as efficiency of management, nature of business territory, and the like, rather than to inherent differences between different types of business.

If the legislature were under a constitutional duty to take into consideration the difference in margins of profit between street railroad companies and gas companies, for example, there would be equally strong arguments to show that it should also take into consideration the immeasurable difference between a street railroad company earning 19% of its gross income and a street railroad company having a net loss.* This would impose upon the legislature an inconceivably difficult task of individual adjustment.

The same may be said of appellant's complaint that it is subject to municipal competition. A gross receipts tax has been held not to constitute a denial of equal protection in spite of such competition. *Puget Sound Power & Light Co.* v. *Seattle,* 291 U. S. 619 (1934) *supra,* p. 18. And in any event, the amount of competition, like the ratio between gross and net income, is a factor varying with individual businesses. Here again, to require the legislature to make adjustments to the varying degrees of competition would be to impose an impossible standard.

(2)

But there is a second and distinct answer to the argument made by appellant, an answer which was adopted by the Court below (R. 65). In the instant case the Municipal Assembly has taken as the unit for classification purposes a larger unit than it needed to take. It has taken as the

* The hardship which the local law might cause to a particular utility so circumstanced is not one on which this appellant may rely to defeat the law. *Blackmer* v. *United States,* 284 U. S. 421, 442 (1932).

unit utilities subject to the Transit Commission or the Public Service Commission.

The result is that rapid transit lines find themselves bedfellows of electric, gas and power plants.

The Municipal Assembly could have gone through the idle ceremony of breaking the commission-controlled group into two groups, and called them: No. 1: rapid transit lines; No. 2: electric light, gas and power plants. And it could have fixed the tax on each at the same rate, *i. e.,* 3% of the gross receipts. Nor could the separate treatment of railroad companies have been successfully challenged, there being no claim that the tax does not affect all transit companies equally. *Southern Railway Co.* v. *Watts,* 260 U. S. 519, 530 (1923).

If transit lines had been separately classified, the comparison (Complaint, paragraph 40, R. 18) between the appellant and the Brooklyn Edison Company would have been obviously irrelevant. It does not gain relevance by the action of the Municipal Assembly in making a coarser rather than a more minute and refined classification. On this point the Court below said (R. 65):

> "Concerned as we are primarily with substance rather than form, we see no reason for holding a tax on a certain type of utility invalid because it is imposed as part of a general tax on all utilities, when the same result could have been achieved by taxing various types of utilities under separate classifications."

(3)

What has been said above is a sufficient answer to appellant's contention (R. 22; Brief, p. 35) that the classification of rapid transit companies with other utilities constitutes an arbitrary and hostile discrimination against appellant

and other street railroads in violation of the due process clause. We are not here attempting to justify "spoliation under the guise of exercising the power to tax" (*Henderson Bridge Co.* v. *Henderson City,* 173 U. S. 592, 615 [1899]). To the local laws at bar, framed as temporary measures to meet an emergency created by a great public need, there clings not the slightest taint of spoliation or other censurable motive. The street railroads have not been singled out for special treatment; they have been included with other utilities under a classification admittedly used by the State in its normal tax program and not challenged as used for that purpose. The tax affects all street railroads, those happening to have contracts with the City like Contract No. 4, and those not having such contracts (*e. g.,* Brooklyn and Queens Transit Corporation, appellant in Case No. 436), the latter condition presumably being the usual one.

Nor was the tax here imposed on utilities the sole measure adopted to raise the needed funds. Recourse was also had (R. 13) to a 2% general retail sales tax, a 2% tax on certain articles of personal property and a short-lived estate tax, as well as to the tax on financial and other businesses referred to above at p. 9. The enactment of these various measures, among which the tax at bar was included as part of a general scheme, shows an attempt to distribute among all classes the burden of unemployment relief, refuting appellant's charges that no thought was given to such considerations.

Judged as they must be, even on a demurrer, by their contents and not by the characterizations in the complaint (*Alaska Fish Co.* v. *Smith, supra,* p. 11, 225 U. S. 44, 49, 1921), the local laws disclose no trace of hostility.

Finally, with reference to appellant's allegations of oppressiveness, we may refer to the well-established doctrine of this Court that when the power to tax exists the extent

of the burden is a matter for the discretion of the law-makers. As was said in *Magnano Co.* v. *Hamilton, supra,* p. 13, 292 U. S., at p. 47, upholding an oleomargarine tax,

> "If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act."

Those who enter upon a business take the risk of hardship arising from taxation. *Alaska Fish Co.* v. *Smith, supra,* p. 11, 255 U. S., at p. 48; *Fox* v. *Standard Oil Co., supra,* p. 20, 294 U. S., at p. 99. Here we may invoke (*mutatis mutandis*) the familiar principle of *Powell* v. *Pennsylvania,* 127 U. S. 678 (1888) that (p. 686)

> "If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

POINT III.

The Local Laws do not violate the obligation of contracts clause of the Federal Constitution.

As its final ground of attack, appellant in its amended complaint (Paragraphs 43-47; R. 22) seeks to make out a case of unconstitutional impairment of the obligation of its contract with the City. The contention now made (Brief, p. 61) is primarily that the imposition of the tax is a violation of the City's *express* covenants.

In so arguing appellant attacks the construction given to the contract by the Court below (R. 66-67). This Court has, we agree, the power to reject the construction below and to determine the meaning of the contract independently, but its usual practice is to "lean toward agreement with the courts of the state, and accept their judgment as to such matters unless manifestly wrong". *Hale v. Board of Assessment and Review*, 302 U. S. 95, 101 (1937). In the present case the result reached by the State Court was amply justified.

It is not necessary here to discuss whether the Court of Appeals determined that the imposition of the tax at bar was expressly allowed by the contract or merely that it was not expressly or impliedly forbidden. Either construction, if sustained, disposes of the present contention.

That the Court of Appeals had in mind the argument that the contract expressly prohibited the imposition of this tax may be demonstrated (if that be necessary) from its opinion. The Court (R. 66) distinguished the case of *Brooklyn Bus Corp. v. City of New York*, 274 N. Y. 140 (1937), on the ground that the contract there expressly provided that any new form of tax upon the franchise should be deducted from the payments to the City. In contrast, the Court pointed (R. 67) to the provision (subd. 2 of Art. XLIX, p. 60) of appellant's contract (Contract No. 4) under which there are to be deducted from gross receipts, prior to any stipulated payments either to appellant or the City,

> "2. Taxes, if any, upon property actually and necessarily used by the Lessee in the operation of the Railroad and the Existing Railroads, together with all taxes or other governmental charges of every description (whether on physical property, stock or securities, corporate or other franchises, or otherwise) assessed or which may hereafter be assessed against the Lessee in connection with or incident to

the operation of the Railroad and the Existing Railroads. Also such assessments for benefits as are not property chargeable to cost of construction or cost of equipment."

Referring to this inclusive definition, the Court said (R. 67):

> "There is thus no basis whatever for reading into the above contract any express or implied obligation on the part of the city to surrender its power to tax the privilege granted to the plaintiff under laws either in existence at the time of the contract or thereafter enacted."

In view of the broad language of the contract itself, by which the imposition of taxes "which may hereafter be assessed" is not only *impliedly,* but even *expressly* provided for, we submit that this construction cannot be considered "manifestly wrong".

Appellant's arguments come to no more than that it is unlikely that a provision such as Art. XLIX, subd. 2, should have been inserted in Contract No. 4; these arguments are ineffective in the face of the fact that such a provision *was* inserted. Again appellant is in substance asking this Court to relieve it of the effect of its own contract.

In effect appellant charges that the City, by the imposition of this tax, is merely attempting to vary the disposition of gross income under Contract No. 4 and to receive a return on its investment which it has not earned under that contract. To this charge, there is a sufficient answer. The money collected by this tax does not go to the City. It may not be placed in the general funds and be used for City purposes. Both the Enabling Acts and the Local Laws so ordain. It must be used for a State purpose, unemployment relief. Appellant fails to distinguish between the City as

party to Contract No. 4 and the City as agent of the State collecting money for a State purpose.

In any event, the case of *Puget Sound Power & Light Co. v. Seattle,* 291 U. S. 619 (1934), *supra,* p. 18, relied on by the Court below (R. 66), is ample authority for its decision. The tax imposed by an ordinance of the defendant city in that case was equal to 3% of the gross income from business in the city during the preceding year. It was assailed on the ground, among others, that "by imposing a license tax upon the privilege of doing the business, the ordinance impairs appellant's franchise contract which gave it the right to conduct the business" (p. 622). The Supreme Court upheld the ordinance and, in rejecting the above contention, said (p. 627):

> "Appellant asserts a contract under its franchise to use the streets of the city for the purpose of carrying on its business for an unexpired term of years. It argues that the franchise is a contract license to carry on the business, and that the exaction of a tax as a condition precedent to the enjoyment of the license will operate to destroy the privilege granted by the franchise. This argument was made and answered in *Memphis Gas Co.* v. *Shelby County,* 109 U. S. 398, and in *St. Louis* v. *United Railways Co.,* 210 U. S. 266. Surrender of the state's power to tax the privilege is not to be implied from the grant of it. Hence, appellant took its franchise subject to the power of the state to tax the granted privilege in common with all other privileges and property in the state. Without a clearly expressed obligation on the part of the city to surrender that power the contract clause does not limit it."

The foregoing case was cited, and its principles applied to the tax here in question, in the *Southern Boulevard* case, 86 F. (2d) 633 (C. C. A., 2nd, 1936), cert. den. 301 U. S. 703 (1937), *supra,* p. 10. There the Court, in affirming an

order granting the City's motion to dismiss the complaint, said (p. 635):

> "Appellant argues that its contract with the City has been impaired, that, by its franchise, it was obliged to pay 5 per cent. of its gross receipts, and that the disputed excise tax of 3 per cent. is an indirect way of altering the terms of its franchise. But the City did not, in granting the franchise, abdicate its power of taxation, and such abdication cannot be implied from the grant of a privilege on specified terms. *Puget Sound Co.* v. *Seattle*, 291 U. S. 619, 54 S. Ct. 542, 78 L. Ed. 1025; *St. Louis* v. *United Rys. Co.*, 210 U. S. 266, 28 S. Ct. 630, 52 L. Ed. 1054; *New Orleans City Ry. Co.* v. *New Orleans*, 143 U. S. 192, 12 S. Ct. 406, 36 L. Ed. 121. It is immaterial that the tax in question is said to be for the 'privilege of exercising the franchise' or that both under the franchise and disputed tax gross income is taken as the measure."

Conclusion.

The judgment appealed from should be affirmed, with costs.

Dated, New York, N. Y., February 2, 1938.

Respectfully submitted,

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